

Request that finality be withdrawn

The undersigned has received a first Office action in this application. It is noted that the Examiner has made this Office action “final”.

In the Examiner's brief dated June 11, 2009, the Examiner had introduced new matter during appeal, namely a new definition of “adjacent”. In applicant's reply brief dated July 27, 2009, applicant provided a different definition of “adjacent”. On October 28, 2009, the Examiner denied entry of the reply brief on the view that this definition of “adjacent” raised the issue of new matter. Applicant filed an RCE.

The Examiner is respectfully reminded that this application thus contains material which was presented in the earlier application after final rejection, but which the Examiner denied entry on the view that the issue of new matter was raised.

The Examiner is further respectfully reminded of MPEP section 706.07(b) which says:

... it would not be proper to make final a first Office action in ... an RCE where that application contains material which was presented in the earlier application after final rejection or closing of prosecution but was denied entry because ... the issue of new matter was raised.

By reason of the foregoing, it was improper for the Examiner to make this Office action “final”. It is requested that the premature holding of “finality” be withdrawn.

Respectfully submitted,

/s/

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